ART. III. — 1. *Strafgesetzbuch für das Königreich Bayern.* Munich. 1838.
2. *Actenmassige Darstellung Merkwürdiger Verbrechen.* Von ANSELM RITTER VON FEUERBACH. Giessen. 1839.
3. *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts.* Von A. VON FEUERBACH.
4. *Code d'Instruction Criminelle de France.*
5. *Code des Tribunaux de France.*

IN a recent number of this Review (April, 1861), we described the principles and methods of criminal procedure in this country and in England; the dual composition of the tribunals; and the fundamental maxims which underlie the superstructure of criminal evidence. An endeavor was made to point out and expose the imperfections and actual faults of these processes; their inefficiency for the object of all judicial inquiry, the discovery of the truth; their natural and constant tendency to screen the guilty by rejecting the chief sources of information; and to show that, while they had their origin in considerations entirely political, they were opposed to the general experience of mankind, and to the principles of human thought and action. In general terms we suggested the adoption into our penal code of some of the elements of the Continental jurisprudence, from those countries which have drawn their legal systems largely from the vast reservoir of the Roman Law. Time did not permit a minute analysis, or even a general account of the criminal procedure of these European nations to which we refer, and it is proposed in the present article to give a more full description of its methods, as they prevail in the German states, and as they have been modified in France, and to indicate such of their principles as could with advantage be introduced into our own legal practice, and might add greatly to its efficiency as a means for eliciting the truth, punishing the guilty, and exculpating the innocent.

In proposing so radical a change in the law, we of course expect to encounter a vast barrier of opinion and prejudice. The whole legal profession would strongly oppose any remodel-

ling of the machinery of our criminal courts. All of our law books, from the earliest Year-Book down to the last volume of Revised Statutes, are written in the firm conviction that the English system is the bulwark of civil liberty, and the flower of a perfect civilization. The young man entering upon a course of legal study imbibes it from the pages of Blackstone, he hears it from the lips of the judge on the bench and in the conversation of the leaders of the bar, and he is gratified that he lives under a code of laws administered by a jury, and pities the benighted European, who may be subjected by a cunning and tyrannical judge to the insult and torture of a personal and perhaps secret examination, in order to extort a confession of guilt. Taking their tone from those who devote themselves exclusively to the study and practice of jurisprudence, the mass of educated men adopt the same opinions, supported and strengthened as they are by English history and literature.

The English are proverbially conservative; and from the time when the sturdy Barons delivered their blunt "Nolumus leges Angliæ mutari," to the present day, it has required a vast amount of labor to effect the abatement of acknowledged social or political abuses; but when they do arrive at the point of a reform, they stop at no half-way measures. It is within the memory of young men, that the practice in the civil courts of England was encumbered by all the intricate machinery which made it intensely difficult to arrive at the real point in dispute between the parties to a litigation; when the distinction of forms of action, and all the arbitrary rules founded upon it, were in full force; when the ancient maxim of evidence excluding parties, and all persons pecuniarily interested in the event of a suit, from the witness-box, was rigidly applied in each case; when the legal and equitable remedies were sternly separated and administered by different courts; when a suit in chancery might last a life-time, and absorb a whole estate, and would generally be so involved with the rubbish of mere practice as to be protracted for years. The very men who have seen Lord Eldon fiercely resisting any change in these antiquated abuses have lived to see them all swept away; forms of action abolished; parties testifying in their own be-

half; husbands and wives witnesses for or against each other, except in proceedings for divorce on account of adultery; law courts entertaining equitable defences; a chancery case a short and simple proceeding; county courts rendering minor litigation speedy, inexpensive, and certain; and in fact changes far more sweeping and radical than have yet been made in any American State, not even excepting New York. We remark, in passing, that the reform of the Court of Chancery had been accomplished before Mr. Dickens commenced the publication of Bleak House, and so far as that story was intended to be reformatory, the author was attacking an exploded abuse, and vigorously fighting an already lifeless enemy. When we see such sweeping reforms made in the civil administration of justice, reforms which go to the very bottom of the Common Law system of practice, and which, abandoning its principles, substitute those of the Civil Law, we cannot but believe that in time similar and equally effective modifications will be made on the criminal side of the courts.

No doctrine has been more deeply inwrought into the English law, than the absolute separation of legal and equitable proceedings. This division was the very essence of the Common Law methods of trial, and the Court of Chancery was for a very long time looked upon with the utmost jealousy and abhorrence by the English people, who hated and despised anything borrowed from the Roman Law. Lord Coke's writings and decisions bristle with his pointed assaults upon the jurisdiction and proceedings of the courts of equity. In fact, trial by jury and strictness of distinction between legal and equitable actions are correlative. The issue must be narrowed by a succession of logical pleadings, eliminating a single point of dispute, to be apprehended by the twelve laymen whose unanimous consent must decide between the parties. It is simply impossible that a jury should pronounce a decree in equity, adjusting the various rights and duties of suitors. But the Civil Law knew no such distinction. All actions were of the same character, brought before and adjudicated by the same tribunals. In their late changes, then, the English have utterly abandoned the peculiar feature of the Common Law procedure, and have adopted the germ of that of the Civil

Law. That this germ will grow and develop itself, until it embraces not only the methods of determining individual private rights, but also the disputes between the state and parties accused of crime, we have no doubt.

As has been said, one great obstacle in the way of legal reform, or change, is the fixedness of professional opinion. The very education and business of lawyers render them conservators of institutions as they are, and in their studies they are constantly recurring to the past, as determining what is, and what should be done in the present. In this country, the law-making power is mainly in the hands of the legal profession. From their ranks are chosen all of our leading legislators, who give shape and tone to public opinion, and from whom originate all modifications of public law. This is true to a far greater extent in America than in England, for we have no great class of landed gentry, who are thoroughly educated, and, being occupied by no business or profession, naturally seek their field of labor and ambition in Parliament. As legislators, the legal profession in the United States, except perhaps in the aristocratic State of South Carolina, supply the place of the country gentlemen in England.

Another and perhaps more serious obstacle in the way of effecting the changes we have suggested, is the strong attachment to jury trial, and the equally strong jealousy of judges, which, making an element in English character, have been inherited and fostered by ourselves. Nervously watchful of our personal liberties, we have been unwilling that they should be committed to any person officially raised above the people, and directly connected with the government in the administration of the laws. We have, through all the political changes of England and America, remained constant to this idea, and have resolutely determined that, when life or liberty is in danger through criminal accusations, the question should be solved by men chosen from among ourselves, of like passions and prejudices with us, trained by no official experience and professional study to be astute in discovering the wiles of the criminal, and bringing to the trial of the issues presented to them only the aid of the average common-sense. No assumption of power by the English government was ever so keenly

resented by the people as the establishment of the Star Chamber, a court proceeding in secret, without a jury, and in opposition to all the methods of Common Law tribunals. It certainly cannot be denied that even English history furnishes too many examples of judicial usurpation and tyranny, and, in fact, it is only since the time of Lord Holt that the judge has ceased to be generally regarded as the instrument and organ of the government, rather than as an officer chosen to hold the scales of justice impartially between the prosecution and the accused. Of the trial by jury we have already said enough for our purpose. Believing it to have been at one time an invaluable blessing, with equal strength of conviction, we believe it to be now worse than useless. It may be remarked, however, that at no period was this method of trial more lauded by English legal and historical writers, than when the prisoner at the bar was refused the aid of counsel to conduct his defence, except in arguing points of law arising upon the indictment, and, compelled to examine his own witnesses and cross-examine those for the state, was thus handed over bound hand and foot to the tender mercies of an ignorant jury. It was the pleasant and ingenious theory of the law, that the judge acted as counsel for the accused.

The danger of judicial usurpation has entirely passed away. In England the force of public opinion is controlling, and a magistrate would be driven from the bench who should lend himself as a tool of arbitrary power. In the American States we have, added to the influence of public opinion, the fact that judges are either directly chosen by the people, or appointed by those who hold their authority from the popular will. In most of the States, the term of judicial office is limited to a few years. We do not commend this practice. We believe that its speedy result will be to deteriorate and demoralize the bench; but we insist that it removes all well-founded apprehension of the judges siding with the government in any attempts to oppress the accused in state trials. Instead of dreading to find in the court a too warm and indiscriminate partisanship of the general or local governments, the danger to be greatly feared is the exact opposite. Under our system of short terms and elective offices, the inevitable tendency is

for the judge to court temporary and local popularity, by consorting with the people against the legislative and executive departments, when any judicial dispute arises between them. The bench will come to be looked upon, not as the goal of a worthy ambition, affording scope and opportunity, when reached, for the labors of a life-time, and the attainment of an honorable fame, but rather as the stepping-stone to a higher or more extensive political preferment in the gift of the people; and during the continuance of the term of office, this result will be constantly in view, and will influence decisions, and the conduct and bearing of the court toward suitors. At best, judges will be content to discharge their duties in a decent manner, so as not to incur censure from the bar or from electors; but the days of Kent and Story, of Marshall and Parsons, have passed forever from our judicial annals. This is not mere speculation, it is a fact, as illustrated in the State of New York, where the elective system is united with short terms of office. We have there seen able and experienced men stricken down in consequence of decisions which were obnoxious to a large class of the inhabitants of their districts, who combined without distinction of political party to secure their defeat. This has been peculiarly marked in those counties where the Anti-rent feeling has thus removed the questions in litigation from the sphere of the courts, and taken revenge at the ballot-box on the offending magistrate for his righteous judgment. We repeat, that the danger to be feared, and it is a great danger, is the unwillingness of judges firmly to support the state in its public prosecutions. The good of society demands that, where the executive is right, it should be unflinchingly sustained, although opposed by local, or even general, public opinion. In the present struggle to preserve our national government from ruin, we have seen the Chief Justice of the Supreme Court volunteer a decision which strikes from the hands of the President all means of protecting the public weal, of enforcing the laws and suppressing rebellion, and these *dicta* of the Chief have thus far been followed in every case by District Judges where the same questions have been presented to them.

Fortunately, state trials for political offences have been very

rare in this country, and judges have had little opportunity to display any undue proclivity either to sustain or defeat the government. On only one occasion, and that a memorable one, has the Supreme Court swerved from its high position, to enter the arena of purely political discussion, and travelled outside of the case before it for judgment, to forestall the action, not only of the legislature and the executive, but of the people also. In all the political cases which have arisen since the adoption of the Constitution, and they occurred in times of extreme party excitement, the courts have invariably acted in a fair and impartial manner between the prosecution and the accused. The only exceptions to this uniform practice have been in the cases of Judge Chase and of Judge Peck, and their offences were against the counsel, and not the parties, and both were brought to the bar of the United States Senate to answer for their alleged misconduct. No prouder illustration of the independence of the judiciary was ever exhibited, either in America or Europe, than in the trial of Aaron Burr for high treason. The character of the accused, his high social position, his long connection with the politics of the country, his transcendent abilities, the exalted station he had held in the government, and, finally, the vastness of his scheme — no less than the founding of an independent empire — and the mystery which shrouded the whole movement, all united to throw a high dramatic interest over the trial. The whole power of the executive was arrayed against the defendant to secure his conviction. Between the President and Mr. Burr there existed a deadly hostility, arising both from their different political principles, and from their rivalry in seeking the Presidential office. Thus the desire of Mr. Jefferson to punish a man whom he thought to be guilty and dangerous to the peace of the country was undoubtedly quickened by a feeling of personal revenge. The lofty standing, reputation, and eloquence of the counsel engaged on either side added much to the absorbing interest of the forensic contest. Over the whole presided Chief Justice Marshall. Calm, cold, unmoved by the pressure from without, he was the embodiment of impartial justice, administered strictly according to the known rules of law. Convinced beyond doubt of the

actual guilt of the prisoner, despising him as a demagogue, and abhorring him as an unprincipled traitor, whose mad ambition would sever the country and embroil the nation in a war with a friendly power to gratify his lust for personal aggrandizement, and knowing the ardent desire of the government for a conviction, he nevertheless firmly held the prosecution within the limits of the constitutional definition of the offence, and applied the law with such strict accuracy, and at the same time with such profound learning and strength of argument, that the case has remained to this day the source from which have been drawn all expositions of the law of treason; and the disappointment at the escape of the prisoner was tempered by the feeling of national exultation at such an example of lofty integrity in the chief judicial magistrate. With such instances continually before us, to instruct and warn the courts, we need apprehend no danger of judges extending too far their official power and prerogative.

It is well known that the body of the municipal law, as well as the forms of its administration in the states of Western, Central, and Southern Europe, are derived from the Roman Civil Law as its source, by as legitimate and direct a descent as is the English and American jurisprudence from the old Common Law of England. Until the discovery at Amalfi, in the year 1135, of a copy of the Pandects, the various national systems, although drawing their life from roots reaching far down into the rich deposit of Roman lore, were yet largely mingled with feudal and local customs. After this important epoch, the study of the compilations of Justinian became universal; learned professors lectured from them in the great universities; jurists commented upon them in works of vast magnitude and number, and judges made their doctrines more and more the basis of decision. The Roman Law, at least after it had become crystallized into codes under the Emperors, was the law of power. The English Common Law was the law of civil individual liberty. Its presumptions were always on the side of freedom, not universally observed in its actual application on the trial of offenders, but in the gradual progress of the nation in civilization the law kept even pace in the development of its germinant principles. It was thus

that the slavery of serfdom absolutely disappeared without any statutory abolition.

But with these invaluable qualities, upon which personal rights rested secure, the Common Law was a rough and meagre code in whatever related to property, trade, and commerce. Of personal property or movables it scarcely deigned a notice. Real property was fettered by the harsh regulations of feudalism. At an early period it was found necessary to borrow from the Roman legislation the principle of uses, or the separation of the legal from the beneficial ownership. It was not surprising, then, that the more cultivated ecclesiastics, in whose ranks were all the learning and study, should struggle in England to substitute the Roman for the Common Law. In this they were unsuccessful. Stoutly resisted by the Barons and the people, they succeeded only in establishing the Court of Chancery, — which, as it professed to act upon the conscience of the suitor, was presided over by a religious person, — the Court of Admiralty, and the regular ecclesiastical courts. On the Continent the attempt was more successful, because the Roman Law already underlay their legal systems, because it was a complete scientific code, even now the wonder and admiration of jurists, and because it promised a ready and effectual support to the rulers, from its fundamental and opening proposition, — "The will of the Emperor is the source of law." The feudal customs of France and Germany were thus gradually superseded and modified, and the Civil Law ruled over the then civilized Europe. The progress of the ages has not failed to mitigate the sternness of this code's devotion to the ruling power of the state; but it is no less true that the spirit of the Civil Law is one of power and authority. It recognizes the safety of the commonwealth as of higher moment than the liberty of the individual. It does not base its whole criminal practice upon strong presumptions of the innocence of the accused; it employs every means to ascertain the truth, and does not reject those which are sanctioned by the universal experience of mankind, even though they result in the surprise and discomfiture of the prisoner; it does not hesitate to probe his own conscience and force from him the truth; and it does not submit his case to a jury of his fellows, with whom

a feeling of compassion is often sufficiently strong to outweigh a mass of convincing evidence, but to a court of trained criminal judges, with whom justice, and not pity, is the impelling principle. It is thus plain that the two systems proceed from opposite points of departure. The one respected the individual, the other the state; the one struggled to acquit the innocent, the other strove to convict the guilty; the one, doubtless, in its actual administration, freed many who should have been condemned; the other, perhaps, sometimes condemned those who should have been freed. Since these contrasting systems were inaugurated in Europe, what a change has passed over the face of society! The individual has asserted his independence, and can demand for himself respect and protection. In England the most powerful administration is swept away by the mere expression of public opinion. Personal rights are secure; is it certain that the state is safe?

In comparing the Common with the Civil Law, it cannot be denied that the use of torture was continued to a much later period in the Continental courts than in England. Indeed, in the latter country recourse was probably never had to this means in the progress of an ordinary criminal trial, but only as a punishment for heinous offences, after conviction. But to state offenders it was applied before trial, to extort confessions of personal guilt, and information of the complicity of others in conspiracies and seditious plots. The design of the use of torture upon persons accused of crime by the European courts, has often been much misapprehended. It has usually been cited as an illustration of the barbarity and cold-blooded malignity of judges, especially of those in ecclesiastical courts, and as a wanton infliction upon the unhappy prisoner of the keenest suffering. Terrible as the practice was, we must not paint it in colors blacker than the truth will warrant. The universal practice of these courts forbade the execution of a criminal for a capital offence until, as supplementary to other proof, however convincing, was added the confession of the prisoner. This confession was indispensable, and persons were sometimes kept in confinement for years until it was obtained. After sufficient secondary proof had been disclosed to produce a moral conviction in the minds of the judges that

the accused was guilty, the torture was applied to extort the final admissions which should precede execution. How much or how little preliminary evidence would be satisfactory before a resort was had to the question, would depend upon the discretion of the judge, and doubtless great and unnecessary cruelty was often practised to gratify feelings of malice and revenge. We offer no apology for the use of torture. Those who excuse, as being actuated by the spirit of the age, Calvin for burning Servetus, and the New England Puritans for murdering old women as witches, will certainly not be too much shocked that the rack, the thumb-screw, and other ingenious contrivances, were in constant use by the criminal courts of Europe.

The principles of the municipal law of the different European countries which were relied upon as the basis of judicial decision, remained scattered not only through local enactments and the Imperial compilations, but also through a great mass of text writers and commentators, who discussed jurisprudence in a most complete and scientific manner. At length the age of codes arrived. The greatest work of the first Napoleon was the codification of the laws of France, which was accomplished under his supervision by the most eminent French jurists, and based upon the Civil Law. Carried over Europe by the progressing arms of the Empire, and imposed upon conquered states, its intrinsic merits to a great extent overcame the opposition to its origin, and it has remained an exemplar and living source of other national revisions.

The purest type of the peculiar excellences and defects of the Continental criminal law is to be found in the German penal codes. The leading one, after which those of other states are largely patterned, is that of Bavaria. This code, adopted by order of the government in the year 1813, was compiled by Anselm von Feuerbach, a distinguished criminal judge, and a learned jurist. Feuerbach was born in 1775, at Frankfort on the Maine. He was a teacher of law at the University of Jena in 1799, and in 1801 was elected an ordinary professor. In 1804 he was commissioned to prepare a plan for a penal code of the kingdom of Bavaria. In 1806 the first

fruits of his labors were seen in the entire abolition of torture by an ordinance drawn up by him. In this he encountered the strong opposition of judges of the old school, who found themselves thus deprived of a very easy and expeditious means of bringing a trial to a speedy close. In 1813, the code, having been completed, received the royal sanction, and was immediately adopted by several other states, was translated into Swedish, and became the basis of the criminal legislation of the whole German Confederacy. In 1814 Feuerbach was appointed Second President of the Court of Appeals in Bamberg, in 1817 was promoted to be First President of the Court of Appeal of the Circle of Rezat, and was afterward commissioned to make an examination of the courts and judicial proceedings of France. His works were numerous, chiefly relating to criminal law. The most important were, a Revision of the Fundamental Principles of Criminal Law, published in 1799; Manual of the Private Criminal Law of Germany, 1809; Remarkable Criminal Cases, 1811; Observations on Trial by Jury, 1812; On the Publicity of Judicial Proceedings, 1821; and On the Judicial System and Process in France, 1825. In these writings he has shown himself an illustrious example of the effects of the system under which he had grown, and of which he was a profound master. Of liberal and advanced views, not blindly wedded to old abuses, he was still an ardent advocate of the superiority of the distinctive features of the Continental practice, and retained them unimpaired in his code. Commencing his public labors at about the time when the French had imported the jury trial from England, and other countries were about to follow their example, he vigorously attacked the institution, and resolutely opposed its further adoption. He was evidently a profound student of human nature, and possessed a wonderful faculty of analyzing and combining circumstantial evidence, and tracing the steps of a criminal through all attempts at concealment, thus possessing and calling into use, in his official duties, the very skill resulting from study and experience which is almost entirely wanting in our judges, and completely so in our juries. We give a sketch of the procedure established by this Bavarian code, as illustrative of the whole German criminal law.

The first, and one of the most important, marks of difference which meet us on a comparison of the German with the English judicial process, is the denial by the former of the privilege of bail to persons arrested and accused of having committed offences which subject them to the penalties of the law. The use of bail in criminal cases is almost entirely peculiar to countries acknowledging the Common Law, or which have in comparatively recent revisions borrowed some provisions therefrom. The right of bail is sacred in England, and was so esteemed by our ancestors as to be especially guaranteed by the Constitutions of most of the United States, and in both countries it is protected, and can be enforced by the high prerogative writ of *habeas corpus*, which can be suspended only by the act of the supreme civil power in the state during times of rebellion, or by the proclamation of martial law. Bail is doubtless a relic of the rude organization of society under the Saxon rule in England, when power was localized and distributed into small communities. As a check upon too great license, the several Hundreds were responsible for the conduct of their inhabitants, and the principle of suretyship thus lay at the foundation of the simplest political divisions of the community. With the complete change in the structure of society, this enforced personal accountability has of course been abandoned; but in tender regard for individual freedom, the voluntary personal suretyship has been retained. The right of a prisoner to be discharged from custody upon bail, which we have so scrupulously endeavored to preserve inviolate, is one which in its actual operation is subject to very great abuse, and it may well be doubted whether in this country the evils resulting from this abuse do not practically far outweigh the benefits flowing from the enjoyment of the privilege. It is a matter of notoriety that in our larger towns and cities, where the commission of crime is a profession, and where the vast majority of arrests for ordinary and minor offences are made, the procuring of fictitious or straw-bail is reduced to a well-compacted system, which it is impossible for examining and committing magistrates, in the pressure of their official duties, effectually to evade. The form is observed, the bond taken, and the accused set at liberty, never to appear again unless

upon arrest for a new crime. A comparison of the statistics of the proceedings of our courts, magistrates, and prosecuting officers would show beyond a doubt that a very large proportion of persons arrested for crime escape by forfeiting their bail, and that a majority of the offenders actually tried are those who, failing through want of means or influence or confederates to procure bail, have remained in confinement. This evil is fast turning the arrest of criminals into a mockery, and demands the adoption of some radical amendment of our penal code, which shall secure the speedy and certain trial of persons charged with breaches of the law. We do not advocate a complete imitation of the German practice by the total abolition of bail; but a large discretion should be given to judges and committing magistrates of absolutely refusing it, in cases where the preliminary evidence raises a reasonable presumption of the prisoner's guilt. At present, the only discretion possessed in cases not capital is in fixing the amount of the security, and here the power of the officer is trammelled by the constitutional limitation forbidding excessive bail, which has always been construed as meaning to prevent such an increase by the judge, of the sum required, as will substantially amount to a total prohibition. What the good of society and the security of persons and property demand, is the power of absolutely denying, to a party accused, the privilege of being enlarged from arrest, when the circumstances of the case will warrant the exercise of that power. Without it, and by blindly adhering to our traditional love for the right of bail, the provisions of the law defining and punishing crime are fast losing their sanction and their effectiveness. That the German practice, unnecessarily stringent as we may be inclined to view it, renders the law more "a terror to evil-doers," no one will hesitate to concede; and as the object of all law with punitive sanctions is to deter others from the commission of crime, by a wholesome example, as well as to call into force a proper retribution upon the particular offender, the provisions of the penal enactments should not be such as to remove this salutary fear, by constantly presenting before the minds of the vicious the hope of absolute and speedy escape. The European codes have perhaps given too much force and

prominence to the former design, to the neglect of the personal rights of the citizen, while our own have certainly erred in the opposite direction. A compromise between the two systems would be the golden mean where the truth lies.

The judicial officers of the Bavarian criminal courts are separated into two classes, whose functions are entirely different, — the judges who examine and take the proofs, and the judges proper who decide. The former class combine in part the duties of our examining and committing magistrates, prosecuting or state attorneys, grand juries, and police detectives. It is among these officers that such wonderful skill is attained in reading the obscure writing left behind him by the criminal in his acts, in combining the disjointed circumstances which are grouped about the principal event, in divining the motives and thoughts of a prisoner through all his specious attempts at concealment, and in probing his conscience and forcing a disclosure of the truth by protracted and subtle interrogations.

There is nothing analogous to the investigation by a grand jury, and the finding by them of a bill of indictment. No formal complaint or written accusation is made the basis of the proceeding. When a crime is discovered and brought to the knowledge of the examining judge, he immediately begins to collect the evidence bearing upon it. We will suppose that a homicide is under investigation. The first step is to have a careful detail made of the entire physical appearance of the dead body and of the place where it was found, and where the crime was apparently committed. In conducting this examination the utmost caution and accuracy are employed which the nature of the place and the circumstances and character of the crime will permit. Nothing is left to the mere memory of witnesses who may have been casually present at the scene when the discovery was made. So minute is the examination, that foot-prints are often preserved by plaster casts, so as to be useful in identifying a suspected person by his tracks. In this perpetuating proof, the German method is far superior to our own, although there is nothing in the nature and organization of our criminal machinery which forbids the use of the same means. The difficulty is that we have no class of experienced officials, whose duty requires them to attend to these details,

and to preserve such important *indicia*. Whatever is done of the kind is voluntary. The judge knows nothing of the case until it is called for trial. The examining and committing magistrate hears only the evidence of such witnesses as may be presented to him. It is left to the police and to the state's attorney to discover and perpetuate the evidence. How competent for such a task are our local and municipal police, with a few exceptions, in large cities, of professional detectives, we need not pause to inquire. Prosecuting officers are generally lawyers, chosen in each county for short terms of office, on account of some political preference, and it is not unfair to them as a class to say, that they esteem their duties creditably performed by aiding grand juries in conducting such cases as may be brought before them for investigation, and afterward prosecuting the indictments to trial before the court. Few district attorneys, upon the discovery of even the most heinous crimes, would consider it within the range of their official duties to assume in addition the *rôle* of policemen. It will be readily remembered to what an amount of unfriendly criticism from the public press the distinguished District Attorney of New York City was subjected a few years ago, when, in the prosecution of his official functions in one of the *causes célèbres* which had attracted much attention, not only in the city but throughout the country, he took steps for obtaining by stratagem undoubted evidence of a crime which he was convinced was to be perpetrated. Every person at all conversant with criminal trials in our courts, knows how untrustworthy, vague, and often entirely contradictory, are the sworn statements of eyewitnesses who are called to describe to the jury the same physical *indicia* of the scene of a homicide. This positiveness of the proof that must be the commencement of a judicial inquiry, which we lack through the want of constituted authorities whose especial office is to preserve such facts, the German courts obtain at once, while the aspect of the scene is unchanged, while the memory of the witnesses is fresh, while the examining judge himself can by ocular observations fix the exact topography and appearance of the spot.

Should the circumstances point with sufficient strength of suspicion to any individual as the guilty party, he is appre-

hended and committed to prison. Great caution is observed at the time of the arrest, and during the continuance of the examination, to conceal effectually from the suspected the nature of the crime charged against him, and he is permitted to have no communication with others. Meanwhile the judge proceeds to take the depositions of witnesses. Several persons may be in custody at the same time, and different examinations simultaneously in progress, each following out a separate clew.

The German codes are extremely particular in the character of their proofs, and have established a number of definite rules, which to us may seem arbitrary, but which are really based upon a sure foundation of experience and common-sense. As a starting point in the judicial investigation, the *corpus delicti* must be absolutely proved by credible and sufficient evidence. In murder cases, the detailed confession of the accused is not competent to establish the *corpus delicti;* it only proves the acts which he describes, and not the mortal result from those acts; that — the death — must be still further confirmed by extraneous evidence. In this rule the German is more exacting than the English law, which makes a confession in open court, or even to a stranger out of court, if entirely voluntary, a sufficient ground for conviction of any grade of homicide.

Persons produced as witnesses are divided into classes, according to the degree of confidence which is to be given to their testimony. The evidence of some is considered so untrustworthy that it is absolutely rejected. These are persons who have been convicted or even strongly suspected of perjury, falsehood, or suppression of evidence, and children under eight years of age. Our own system recognizes one of these disabilities, and carries it to a greater extent, by shutting the witness-box to all who have been convicted of felony. In the case of a young child, our practice would ascertain by preliminary questions whether he showed an appreciation of the meaning and sanction of an oath, and if so the examination would proceed. The other persons embraced in this class of incompetents would be allowed by us to be sworn and to depose to the jury, and if the opposite party could destroy

confidence in their veracity by witnesses, impeaching their character, they would be allowed to offer such description of proof, to have such effect with the triers as they might choose to give to it.

The next class is that of suspicious witnesses, and includes accomplices of the accused in the crime, the injured party, informers, except those whose official position renders it their duty to inform, youths under eighteen years of age, persons connected in interest or relationship with the prisoner, or hostile to him, and those of a doubtful general character. All others are sufficient or good witnesses.

The object of this particular classification of witnesses will be seen when we consider the rules by which their testimony is compared and weighed, and the credence given to it. If two sufficient or good witnesses agree as to a fact of which they have the evidence of their senses, the testimony is considered as amounting to proof. The testimony of one such witness is half proof of the fact, and requires the substantiation of other independent evidence. If two suspicious witnesses concur, and corroborate each other in their depositions, it is deemed equal in effect to the testimony of one good or sufficient witness. Our law recognizes the correctness of the idea which lies at the basis of these apparently technical rules; yet it does not shape the principle into any definite provisions regulating the character and weight of evidence, but leaves it vague and undefined, to be applied in each particular case according to the discretion or caprice of judge or jury. An advocate may in his arguments attack with the whole force of his reasoning the testimony of an informer, an accomplice, the injured party, and others embraced in the foregoing class of suspicious witnesses, and the judge may add some suggestions to the comments of the counsel, and will inform the jury that the statements of an accomplice are very untrustworthy, and that they should by all means be fortified by other evidence; yet the jury may entirely disregard these directions from the bench, and convict upon the unsupported testimony given by a single witness of the most suspicious character. Cases are frequent where the leading and almost sole witnesses for the prosecution are the injured parties, and doubtless

much injustice is done by the reliance placed upon their colored and exaggerated accounts. It seems to us that the German criminal law — recognizing, as does our own, the fact that the testimony of this class of persons demands most careful scrutiny, to reject from it the large element of personal bias which causes it to swerve from the truth — is correct in generalizing the universal experience of mankind into these few simple and sharply defined rules, whose observance, though in a few instances it may work injustice against the prosecution, will in the long run produce the greatest number of satisfactory and correct results.

In the nature of the evidence drawn from the witnesses the German practice differs largely from that of the Common Law courts. The two systems are founded upon opposite principles. The direct testimony of eyewitnesses, and the description of all the physical facts which surround the case, are of course received. Circumstantial evidence is also admitted with the same force and effect, and under the same limitations, as in England and America. The circumstances must all be consistent with the theory of guilt, and reasonably explicable by no other supposition, and even then the confession of the prisoner must be added to them to warrant a capital conviction. It is in regard to the accused himself that the important difference exists. In our criminal trials no rule is more frequently quoted, and more strictly enforced, than the one which confines the evidence to the very matter in issue. As was shown on a former occasion, this rule was derived from a careful respect for the rights of the defendant, to protect him from surprise at a time when he may be unable to explain suspicious and damaging circumstances, and also from the composition of the jury, who would be unable or unwilling to divest the case of extraneous facts, which had no bearing upon the question to be decided by them. The German courts are hampered by no such maxim, and there does not exist with them the necessity for its use. We add nothing, in regard to the comparative reasonableness and efficiency of the two systems in this particular, to the suggestions which we have already offered.

In prosecuting the investigation, the judge examines wit-

nesses who have known the accused from childhood and through his whole life, endeavors to trace with the utmost particularity his history from his birth up to the time of the arrest, dwells upon former suspicious acts or circumstances in which he may have been involved, learns his business, his property or means of livelihood, his station in life, his friends and associates, his habits, his religious opinions and practices, — in short, everything which will tend to throw light upon his real character and disposition. As he approaches the time of the offence, he attempts to obtain a complete transcript of the prisoner's daily life, his every act and word. This is all to ascertain whether it be probable that he would have committed the crime charged against him. It is a practical application in a judicial problem of the argument *a priori*.

In collecting evidence, the examining judge does not restrict himself to that which involves the prisoner, but is equally careful to discover and secure all which is in his favor. The witnesses are examined separately, their depositions are reduced to writing by a notary, and attested and preserved for further use.

While the judge is thus proceeding with the other witnesses, he will be conducting the examination of the accused himself, and more reliance is placed upon this portion of the proofs than upon all the rest. The examination is in private, attended only by a notary. The nature of the charge is concealed from the prisoner, nor is he allowed to see the depositions of the witnesses, or informed as to the nature of their contents. The judge commences the interview, by exhorting him to tell the truth, and make a full disclosure, conveying the impression that, if he confesses, his punishment will be mitigated. He is first asked if he knows why he is arrested, and if he professes to be ignorant, or gives a false or prevaricating reply, he is again warned to tell the truth. If he continues to deny knowledge of the cause of arrest, the examination closes for the day. If he utterly refuses to answer, he is put upon a diet of bread and water in solitary confinement until he relents. The questions and answers are carefully reduced to writing by the notary. The judge is very minute in his inquiries, gradually advancing from day to day from trivial questions to those of

the utmost moment, inwrapping the culprit in a maze of interrogatories, apparently without definite design, but really all tending toward the grand final result, the complete breaking down of the defence. The examination is often a severe contest of intellects between the officer and the prisoner, the former endeavoring to conceal as far as possible the object and design of his questions, so as to afford little or no opportunity to anticipate a course of interrogatory, and thus to be prepared to meet it, and the latter on the other hand calling into action all his powers of mind to evade the scrutiny of the judge, to tell a reasonable and consistent story, and to remain firm to his narrative in the face of every attack. The records of trials published by Feuerbach afford some most remarkable instances of the astuteness and caution of the judge, and the shrewdness of the prisoner, who would for days persist in the same account, and, when finally driven from it by the advancing outworks of his wily inquisitor, would abandon his position with the greatest apparent candor, concede that it was false, and intrench himself behind new ramparts, and, when thus dislodged from one stronghold after another, would at last confess the crime with the utmost particularity of detail, and in exact accordance with the statements of other witnesses. Many guilty persons are thus driven by sheer weariness to give up the contest and surrender at discretion. When the prisoner is very obstinate, and, notwithstanding all his self-contradictions and falsehoods, still persists in denying the actual guilt, the case may be protracted for a long time; and if he succeed in exhausting the patience of the judge, he may be sentenced to close confinement, even in chains, for life, but will not be executed. In murder cases, the accused is brought to the scene of the homicide and placed before the dead body, and there, under the terror which may be naturally excited by these means, he is closely interrogated. Timorous and weak-minded persons may by such devices be frightened into a confession, or be betrayed into such admissions as, pursued with steadiness by the judge, will lead to a full disclosure; but with hardened criminals, to whom scenes of blood and violence are familiar, this melodramatic contrivance will have but little good result. In one case, where the prisoner was

really guilty of an aggravated murder, and had been under repeated and long-continued examinations, he was brought before the judge, with every appliance of solemnity to heighten the effect, and suddenly placed face to face with the bare and grinning skull of the double victim of his lust and his cruelty, and the only effect was a faint smile, and a sententious religious remark.

Another means of startling the prisoner into an acknowledgment of the truth is by confronting him with witnesses. The Bavarian code contains an entire chapter devoted to the details of this subject. Should the party, after numerous interviews, persist in a story known to the judge, by the testimony of witnesses, to be false, he is required on a particular examination to repeat his narrative with all the minuteness possible; and immediately, with the lie yet upon his lips, and suddenly, he is confronted with some witness who has told the truth, perhaps an accomplice, of whose revelations he has been kept in entire ignorance. Being thus face to face with another person whom he knows to be acquainted with all the facts, he is again examined as to the same matters, and directed to explain and reconcile the discrepancies between his own account and that of the witness. They are both interrogated together, and every means is employed to drive the prisoner from his position. This confrontation is sometimes made with several witnesses successively, and the accumulating evidence of the culprit's falsehood becomes overwhelming, and rarely fails to produce the desired effect.

A confession, to be a sufficient ground for a sentence of death, must be made in the most formal manner. It will not suffice if the disclosure be given at the first examination; it must be at a regular interview, before judge and notary, and subsequently repeated and confirmed on another day.

The method thus pursued by the German criminal judges in their official investigations, is certainly productive of the most astonishing results. In the cases described by Feuerbach in his collection of Remarkable Criminal Trials, all the criminals, except two or three charged with minor offences and evidently innocent, confessed their guilt under the searching examination to which they were subjected. Some, indeed,

qualified their confessions by statements of mitigating circumstances, to save themselves from the extreme penalty; but the majority made a full and elaborate disclosure, with great minuteness of detail. This remarkable phenomenon seemed to Feuerbach to require some explanation, and he gives from his experience the principal motives and reasons which impel criminals to a confession. A portion are driven to the avowal by feelings of remorse, goaded on by the stings of an angry conscience. This class, as may be supposed, is by far the smallest of all. Others are influenced by a sentiment of shame at their futile attempts to escape the scrutiny of the examiner. They find themselves detected in lie after lie; no story, however plausible, can resist the keen perceptions of the judge; he penetrates all their subterfuges, and exposes them both to themselves and to the court as liars and perjurers. Others yet are induced by an expectation of mitigating the punishment of their crimes. They are in the hands of the judge, who can increase or diminish at pleasure the penalties inflicted upon them, and with a view to escape the extreme rigor of the law, and to propitiate the favor of the court, they open their hearts and disclose their guilt. But the far greater number are driven to confess by sheer exhaustion, by a desperate feeling of inability to cope longer with their subtle antagonists; and they thus abandon the contest, and sullenly yield to their fate.

The detail of this method of endeavoring to force the truth from the breast of the unwilling criminal by unfair advantages, by mental torture and terrible sights, is certainly most reprehensible. It shocks all our instincts and feelings of justice and humanity. The isolation of the suspected person after his arrest, the denial of legal counsel to aid and instruct him in shaping his defence, the concealment from him of the very nature of the charge, are all invasions of natural rights which belong as well to the guilty as to the innocent. It is these particulars, so evidently oppressive, together with the artifices employed by the judge to entrap the party into contradictions in his replies, all of which are unnecessary excrescences upon the simple principle of a personal examination, which have brought that principle into such disrepute with English and

American lawyers and legal writers. Strip the system of these blemishes, allow the prisoner to communicate with counsel, inform him of the nature of the crime alleged to have been perpetrated by him, reject all vulgar appliances for inspiring terror, make the examination public in the course of the trial, and we shall preserve the essential features of the German procedure, and give to our courts a most powerful aid in discovering the truth, while at the same time we shall sufficiently guard the rights of the accused.

Another provision of the methods under review which is equally unnecessary and injurious, is that requiring the confession of a person on trial before his conviction of a capital offence. This reliance upon the efficacy of a formal confession is the real cause of the arbitrary manner of conducting the investigation, and of the unjust artifices employed to surprise and outwit the defendant. It is a strange inconsistency in a criminal code which professes so to value human life that it cannot be judicially destroyed except by the voluntary act of the accused party, that it should sanction and establish the most subtle and refined means to take advantage of that party, to work upon him by mental torture, and at last to reduce him to such a state of exhaustion, that he confesses, to seek refuge in death from the untiring foe that pursues him. There are no valid reasons by which this rule can be supported. All judicial evidence is imperfect, yet it is, and must be, continually acted upon. There is no distinction between the nature of the proofs which establish a murder, and that of those which establish a robbery. As the former is an offence of a higher grade, and the penalty of death once inflicted can never be recalled, it is of course incumbent upon juries and judges in such cases to consider, compare, and weigh more carefully the facts presented to them, that if possible all sources of mistake may be eliminated. A heavier responsibility rests upon the triers in making their decision, demanding the utmost caution and calm deliberation; but the character and quality of the evidentiary facts upon which a verdict is based are the same in all criminal trials. A confession is no more a legitimately necessary step to conviction of a capital offence, than to that of a larceny or an assault. The adoption

of the principle of examining persons on trial for crime does not, then, involve the prosecution of that inquiry in any instance until it result in a confession. The disclosures made by the prisoner should be considered in connection with other developments of facts, as a part of the general evidence in the case, all to be passed upon by the judge or jury, and a conclusion reached according to the preponderance on the one side or the other, sufficient to produce a mental conviction of reasonable certainty. The practice of requiring a confession in capital cases was derived from a religious source. It doubtless had its origin at the time when the Church of Rome reigned supreme throughout Europe, and the influence of its doctrines and teachings penetrated the courts as well as every other institution of society. The doctrine of the confessional as a prerequisite to priestly absolution was imported into the criminal procedure, and the life of even the most atrocious violator of the law would not be sacrificed, until the Church had by absolution relieved him from the dread penalty of eternal punishment. These considerations would now prevail in those countries where the Romish Church is strictly recognized by law as a part of the state polity.

The duties of the examining judge cease with the completion of the evidence. The prisoner is then allowed the assistance of an advocate, who may confer with him in private, and is furnished with a copy of the depositions and other proofs. The counsel from these data prepares a minute of his objections to the proceedings, and to the sufficiency of the case made by the prosecution; and a written argument in favor of his client, such as is warranted by the facts, and the whole evidence, together with the defence, is forwarded to the Central Criminal Court of the Circle or District for decision. This court consists of professional judges, appointed from the ranks of advocates, or promoted from inferior courts, and it decides by a majority, determining not only the degree of the crime, but the punishment to be inflicted. Upon the reception of a case by the court, it is referred to one of the judges, who after careful examination is to report whether it be ready for decision, and, if so, whether the accused is guilty or innocent, and if guilty, of what offence, and what should be the punish-

ment. Should he report that the case is not ready for decision, and the other judges concur, it is remitted for further evidence upon the points which are insufficiently established. Should the case be in a state to proceed, the court passes to consider the other questions. It will be seen that the judges who decide the questions of fact do not have the aid of a personal inspection of the witnesses, which is so properly guaranteed to our criminal courts, and to parties accused, by the fundamental law; but this serious want is partially supplied by the exceeding minuteness and particularity of the examination, both of the witnesses and the prisoner, pursued by the inferior judges. But no careful attention to detail will atone for the great injustice done to a prisoner by subjecting him to the hazard of a decision affecting his life or liberty, made by a court who are utter strangers to the witnesses.

When the case involves questions of medical science, as for example when the defence is based upon the alleged insanity of the accused, the court may associate with itself, or refer the cause to, medical experts, as assessors who aid the judges in their conclusions. In the prosecution of this inquiry, a new examination may be ordered to elicit proof of the special facts not fully established, and thus to satisfy the minds of the judges and assessors. Too much cannot be said in praise of this method of judicial investigation and decision as to matters of science, upon which the whole disposition of a criminal cause may turn. Compared with it, our practice of submitting these questions to a jury is palpably and wickedly absurd. The argument upon which the advocates of a jury most rest their cause is, that a criminal trial involves only facts within the knowledge and understanding of men of ordinary common-sense, with which they are familiar in their daily experience, and of which they have the same ability to judge as trained officials, and that in the aggregate it is safer for the state and the accused that the determination of facts should thus be exclusively committed to laymen, chosen at large from the body of respectable citizens. Giving to this reasoning its full force, conceding that it disposes of the question in dispute, it does not establish the propriety, it rather demonstrates the absurdity, of permitting juries to entertain questions entirely

or partially scientific. We do not ask them to settle a disputed point of law, because their ordinary common-sense does not embrace a knowledge and comprehension of jurisprudence, and for the same reason we should withdraw from them such subjects as that of insanity, an understanding of which, even in the present state of medical science, requires years of study and practice. The German codes appreciate the difficulty which even learned and experienced judges must encounter in undertaking to solve, without assistance, questions involving this intricate department of medical jurisprudence, and wisely defer to the knowledge of men who have given to the matter their especial attention. We might in our courts still retain the jury trial in criminal cases, and at the same time avail ourselves of the benefits of the German process, by removing such issues as insanity from the jury, and submitting them to a number of medical assessors, appointed by the bench, whose decision, made in the light of legal instructions from the court, should establish the fact in the same manner as the ordinary verdict. This alteration would leave the judges and the jury in the exercise of all their proper functions, and would aid both by the authoritative opinion of scientific experts upon a question of fact peculiarly within their knowledge. Some such amendment, we are confident, must be made in the machinery of our criminal trials, to rescue the law from its present anomalous position, and to place it in sympathy with the condition of medical science, which, through the researches and discoveries of physicians, has made a great advance in the department of insanity since the time when the English judges pronounced the decision which has been followed almost without exception in England and the United States.

When the sentence of the Central Criminal Court is death, or imprisonment for more than twenty years, the case is carried to the High Court of Appeals for revision, and in all other instances the prisoner may appeal to the same court at his option. Should the convict be dissatisfied with the decision of the first Court of Appeal, he may demand a second appeal to a different court. The Courts of Appeal, in cases involving such issues as insanity, may direct a reference to the local medical societies or colleges for their opinion, and their decision may

be reviewed by the Supreme or General Medical College of the kingdom. Should the judgment of the Central Court be reversed on appeal, the prisoner is immediately discharged; should it be affirmed, the penalty is executed within twenty-four hours. The Court of Appeal may also modify the sentence of the inferior tribunal, and convict the prisoner of a different crime, and subject him to a greater or less punishment.

We have thus given a sketch of the procedure in the Bavarian criminal courts, which may also be taken as a fair illustration of the methods which prevail throughout the German states. To those who have grown up under the influence of the English Common Law, the imperfections of this Continental system are evident. Its excellences will appear no less remarkable to those who examine its workings, and reflect upon the design of all judicial inquiries. The English trial is more dramatic, the German more thorough; the one searches after the truth in an indirect way, rejecting many trustworthy sources, the other leaves no means untried, and in theory, and for the most part in practice, does not stop short of absolute certainty; the one anxiously throws its safeguards about the prisoner, to prevent the state from encroaching upon his rights, the other regards all those rights as forfeited, or subservient to the general welfare; the one convicts upon presumptions, the other studiously avoids all presumptions.

We had intended to give extracts from some of the trials set forth at large by Feuerbach, to illustrate the practical operation of the German judicial process, but our space will not permit. Some of the most important and interesting of these cases have been translated, condensed, and published by Lady Duff Gordon.

Up to the time of the first Revolution, the French criminal procedure was in a most unsatisfactory and deplorable condition. The general method was that of the Civil Law. The judges were ignorant, venal, and cruel; bribery was common, even universal; the distinctions of rank were regarded on the bench and in the prisoner's box; few or no rights were accorded to the accused; the use of torture was frequent and extreme, the double question being readily resorted to; cases

of the most frightful injustice and barbarity were continually occurring. Startled by one of these instances of more than ordinary atrocity, and espousing the cause of the victims, Voltaire brought the whole force of his sarcasm and weight of his influence to bear against the system, and did much to arouse the public indignation against its enormities, and to hasten its downfall. One of the first steps in the reorganization of society and the government at the Revolution was the remodelling of the whole criminal code, and the ingrafting of a portion of the English practice upon the original stock of the ancient law. By a decree of the Convention in 1791, trial by jury was imported, and a quasi grand jury established, from which all criminal charges of certain grades must originate. This body, called the *jury d'accusation*, consisted of eight persons, and three votes in favor of an accused party prevented an indictment. This imitation of the grand jury was found to be incompatible with the habits and character of the French people; it proved a failure in its operation, and was retained but a few years, being abolished in 1809. In that year, under Napoleon, the whole body of the law was condensed into codes, each of which related to a general department of jurisprudence. The *Code Civile*, called pre-eminently the *Code Napoléon*, comprised the municipal law regulating private rights and wrongs. The *Code Pénal* defined crimes against the state, and apportioned punishments. The *Code d'Instruction Criminelle* related to the organization of criminal courts, and their procedure in arraigning and trying persons accused of crimes. These several codes have substantially remained to the present time, the alterations and additions being slight. The criminal procedure of France is now a mixture of the English and Continental forms, which, as we have seen, are irreconcilable, entirely unfitted to work harmoniously together with any satisfactory result. Some of the ablest and most distinguished French jurists have pronounced very strongly against the jury trial, as administered in their judicial proceedings.

Without referring to the organization or jurisdiction of the different courts, or to the practice of the inferior tribunals, we will describe the peculiar features of the methods in use in courts of general or higher jurisdiction, the *Cours d'Assises*.

After a preliminary private examination, and decision by a court of higher jurisdiction whether the evidence against a suspected person implicates him sufficiently to warrant a public trial, the case is, upon an affirmative determination, remitted to a *Cour d'Assise* of the department where the crime was committed, for further proceedings. In this court the trial is public, and the prisoner may make his defence either in person or by the aid of counsel. Juries are used in criminal cases only, to decide upon the guilt or innocence of the accused. The court consists of several judges, the chief of whom is called the President, and possesses powers and discharges duties peculiar to his office. The jury are twelve in number. The panel, consisting of sixty names, is drawn by the Prefect of the department in which the court is held, and much opportunity is given to the government, through the President, to influence the choice of jurymen, as he may reject twenty-four names from the whole number, and the prosecuting officer may challenge twelve, while the defendant, or defendants, if more than one are joined in the charge, may object only to twelve. The government may thus strike out three persons to the prisoner's one, and practically control the selection. The foundation of the judicial proceeding, answering to an information laid by an English Attorney-General, is an *acte d'accusation*, prepared by the Procureur-Général, a ministerial officer representing the government, and conducting the prosecution on its part. This *acte* differs largely from our indictment. The latter is scrupulously technical and guarded. It states in legal language and in general terms the crime charged, without any detail or evidence. In setting forth a murder, for example, the effective statements are, that at a certain time and place the defendant, with malice aforethought or premeditated design to effect the death of a particular person, by a certain instrument inflicted a blow upon him from which death resulted, and thus feloniously murdered the deceased. Everything is simple, concise, and to the point, and by an unalterable rule the indictment must be confined to a single offence. The French Code directs that the *acte d'accusation* shall state, first, the nature of the crime which forms the basis of the charge, and, secondly, all the circumstances connected therewith which tend to aggra-

vate or diminish the guilt. The result of these directions is, that the *acte* is regarded by the state's officer as a proper field for the display of his eloquence in composition; it abounds in graphic and picturesque descriptions of the persons and scenes involved in the case; it assumes and states as matters of fact the thoughts conceived by the accused and the victim, and the motives which prompted the deed; it details at length the personal history of the defendant, his advantages and prospects, his temptations and fall; it aggravates the feeling of horror at the crime and condemnation of the perpetrator by violent denunciations and pointed appeals to the jury; in short, it buries the simple complaint in a mass of incident, assumption, argument, and abuse, which destroys entirely the character of the instrument as a calm, grave preliminary statement of the grounds for the proceeding of the government against the person at the bar.

On the trial, the *acte* is first read to the court and jury. The witnesses for the prosecution and defence are then summoned, removed from court, and kept separate, and apart from the trial. Those for the prosecution are first called and examined, in such order as the Procureur-Général may determine, and are followed by the witnesses for the defence. The whole examination and cross-examination are conducted by the President. The French law renders incompetent as witnesses the father and mother of the accused, and all other ancestors in the direct ascending line, sons and daughters and all others in a direct descending line, brothers and sisters, husband and wife, even after divorce, and informers who are rewarded for their disclosures. Informers who receive no recompense are permitted to testify; but their character must be explained to the jury. The rules of evidence resemble rather those of the German system than those of the English. The evidence is not confined to the mere matter in issue, but takes a wide range; embracing not only the testimony of eyewitnesses as to the facts actually seen by them, the description of physical *indicia*, and all other strictly circumstantial or presumptive proof, but even opinions, arguments, inferences, hearsay, and the like.

Our American readers must have been surprised on learning

in the accounts of the late Bonaparte trial in a civil court in Paris, that a letter written by an American residing in France, addressed to Prince Napoleon, purporting to describe the public opinion of the people of the United States in regard to the validity of the marriage between Miss Patterson and her husband, and the motives which led her to the step, was given in evidence by the counsel for the defendant, and commented upon by him in his argument, and that the distinguished advocate for Madame Bonaparte thought it necessary to destroy the effect of this letter by showing the infamous character of the writer by hearsay evidence. With such a mass of irrelevant matter laid before a jury, it would be surprising if their decisions were entitled to much consideration or commanded much respect.

In addition to the testimony of witnesses, the accused himself is interrogated. This examination is conducted by the President. Although the code does not define the character of the proceeding, or prescribe the nature of the questions to be put by the court, yet in practice it is usual for the President to employ all the artifices possible upon a public trial to entrap and defeat the accused. His guilt is assumed in the structure and purport of the interrogatories; browbeating is continually resorted to, unfair advantages are taken, and every means used to discomfit and break down the defendant. His past life is explored, a general investigation made into his character, habits, and pursuits, and of course much elicited strongly tending to prejudice any jury of laymen.

In this proceeding we see nothing to commend, everything to censure. While we advocate the examination of persons on trial as a part of the regular course of a judicial investigation, we insist that it should be conducted in a dignified and solemn manner, keeping the functions of the court separate from those of the prosecutor, and leaving unimpaired the rights and privileges of the prisoner. The official position and duties of a presiding judge, especially in criminal trials, require that he should be removed far above even the appearance of partisanship, that he should hold the scales of justice with stern impartiality between the state and the accused. Where the facts are exclusively left to a distinct tribunal, the judge is to determine

the law without reference to the consequences to either party: with the question of guilt or innocence he has no connection. He is to observe that the proper forms of judicial proceeding are carefully regarded, and he should scrupulously refrain from influencing or attempting to influence the jury in forming their conclusions and arriving at a verdict. The French procedure violates all of these salutary rules. The judge enters the arena as a partisan. In examining the witnesses, and especially in interrogating the prisoner, he is actually engaged in an attempt to procure a conviction. It is immaterial how fair and impartial he may resolve to be, it is impossible for the most elevated, pure, and conscientious officer to resist the tendency to bias which must result from the faithful discharge of these duties, which naturally belong to the public prosecutor. The direct effect upon the jury is even greater than the reflex effect upon the judge himself. When they see before them the spectacle of the highest judicial officer, presiding over the trial, announcing the solemn judgments of the law, yet from his position of advantage engaged in a contest with the prisoner at the bar to entrap him into contradictions, assuming his guilt, addressing him as an actual culprit, and even browbeating him, they are inevitably led to infer the great probability of guilt, whatever may be the character of the proofs offered to them. They catch from the bench the evident leaning of the judges, and their desire for a conviction, and so the accused party is deprived of the very safeguard which its friends so strongly insist that the jury affords to a criminal upon trial.

The influence of this practice upon the prisoner is no less unfortunate. Standing charged by the state with the commission of crime, and in peril of his liberty or life, he should be able to look up to the judge as the embodiment of the majesty of justice, stern perhaps and unyielding, yet giving to him, as well as to the government, his rightful due. He is thus forced to reverence the law and institutions which he has violated, and which convict him, — to kiss the rod which smites him. What then must be his feelings when he sees the high representative of the supreme power in the state, and of the authority of the law, assume the character and office of an inquisitor, and pursue him by every artifice which superior skill

and experience can suggest, to extort a damaging admission and procure a conviction. All respect for the law and the court must vanish, and the criminal, instead of acknowledging the justice of his punishment, must only become more hardened.

When the case is submitted to the jury, they decide by a majority. Should the division be seven to five, the members of the court must also deliberate upon the questions of fact, and are polled, and their vote is added to that of the jury, the decision being that of their united voices. The verdict of the jury may thus be overruled by the votes of the court joined to the minority. The court may also, on their own motion, set aside a verdict which is plainly wrong; and their act is final. Abundant privilege of appeal to higher courts is given to review questions of law.

ART. IV. — 1. *On translating Homer. Three Lectures given at Oxford.* By MATTHEW ARNOLD, M. A., Professor of Poetry in the University of Oxford, and formerly Fellow of Oriel College. London: Longman, Green, Longman, and Roberts. 1861. 12mo. pp. 104.

2. *Versiones Homeri Anglicæ inter se Comparatæ.* Scripsit DAVID GEORGIUS PENON, Doctor Philosophiæ. Bonnæ: apud Adolphum Marcum. 1861. pp. 60.

THE scholar who reads Homer's Iliad continuously through, with a sufficient knowledge of the language to understand what he reads without stopping to translate, and with an ear sufficiently trained to the hexameter movement to recognize and note its stately march without hesitation, will receive very different impressions from those of the critic who searches for false readings, interpolated passages, and variety of authorship. The first thing that would strike him is the close connection of the different parts of the story. It commences at one of the principal turning-points in the fortunes of the war. The quarrel between Achilles and Agamemnon is introduced by a brief and rapid narration of the circumstances that led